Supreme Court, U.S.
FILED
JUL 27 2001

No. 00-1293

IN THE

Supreme Court of the United States

JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,

Petitioners,

vs.

AMERICAN CIVIL LIBERTIES UNION, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

Brief Amicus Curiae of The American Center for Law and Justice Supporting Petitioners

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INTEREST OF AMICUS CURIAE[1]

The American Center for Law and Justice ("ACLJ") is a national, nonprofit pro-life, pro-family and religious liberties organization. The ACLJ was organized to preserve, protect, and promote religious liberty through education, legal defense, legislative assistance, and related activities. Among other activities, the ACLJ focuses on the family as the primary social and religious institution of a just society. The ACLJ is dedicated to defending families against efforts to undermine their sovereignty, nature and importance. Moreover, the ACLJ is committed to supporting appropriate efforts by Congress and the States toward the creation and sustenance of a social order that supports the important work of families: rearing children.

The present case addresses the questioned constitutionality of a federal statute designed to provide workable, reasonable boundaries around commercial Internet sites that traffic in indecent images and messages. In enacting the Child Online Protection Act ("COPA"), Congress demonstrated its constitutionally reasonable judgment that those commercial vendors of indecent materials should bear the costs of insuring that children are not likely to access their wares. The mechanisms of the challenged statute are important means of protecting children. The proper resolution of this case is a

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1. Counsel of record for both the Petitioner and the Respondents have consented to the filing of this brief, copies of the letters indicating their consent are being filed *instanter*. Pursuant to Rule 37.6, amicus disclose that no counsel for any party in this case authored in whole or in part this brief and that no monetary contribution to the preparation of this brief was received from any person or entity other than *amicus curiae*.

matter of substantial organizational concern to the American Center for Law and Justice because of its commitment to American families.

SUMMARY OF ARGUMENT

Without argument or briefing to the point, the Third Circuit held that Congress' adoption of the "community standards" reference in the Child Online Protection Act's (COPA) "must lead inexorably to a holding of a likelihood of unconstitutionality of the entire COPA statute." *ACLU v. Reno*, 217 F.3d 162, 174 (3rd Cir. 2000). With that surprising and sweeping judgment, the Third Circuit rendered the entire COPA statute unenforceable.

The judgment below is erroneous and should be reversed. Congress' reliance on community standards in determining pruriency, the signal feature of COPA that was the basis of the decision below, is completely consistent with this Court's prior decisions. Moreover, no alternative ground for affirmation of the judgment below survives analysis informed by the relevant decisions of this Court.

ARGUMENT

I. THE PROTECTION OF CHILDREN IS AN INTEREST OF THE HIGHEST IMPORTANCE

In the constitutional order, policy making is the prerogative of Congress. It does not belong to the Respondents, nor to the court below, nor even to this Court, to make or to unmake the fundamental policy judgment that the Congress embodied in the

Child Online Protection Act. Instead, it is the peculiar province of Congress to make the policy judgments that lead to the enactment of legislation. Alexander Hamilton hopefully expounded,

> The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

The Federalist No. 78, at 393-94 (G. Wills ed. 1982). That exercise of will is the essence of policy making; consequently, the exercise of will is a legislative function.[2]

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2. Those that the laws by which a nation is governed are its governors. According the United States Constitution, Article I, the power to make laws belongs to Congress. When the power to make laws is usurped by actors within another branch, against the direction of the Constitution, then constitutional disorder is threatened. As the Great Emancipator taught, democracy itself is put in jeopardy when judicial officers play at legislation:

> The candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, . . . the people will have ceased to be their own rulers, having to that

A proper respect for constitutional governance not only tends to suggest that Congress should craft laws with care so that they do not cross constitutional boundaries, but also that courts should not lightly resort, or with ease, to judicial invalidations of Acts of Congress. Yet there is little doubt that the judgment of the Third Circuit evidences just such judicial ease with statutory invalidation.

Here, Congress has acted upon a policy judgment. That policy judgment is that the protection of children from the harmful consequences of exposure to indecent materials is an interest of the highest order of importance. That policy judgment is longstanding, and this Court has not found it to be constitutionally suspect. Rather, this Court has acknowledged that the interest identified by Congress is compelling. "It is evident beyond the need for elaboration" that the government has a compelling interest in "safeguarding the physical and psychological well-being of a minor." *New York v. Ferber*, 458 U.S. 747, 756-57 (1982) (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982)). Further, "[a] democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens." 458 U.S. at 757 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944)).

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extent practically resigned their Government into the hands of that eminent tribunal.

A. Lincoln, First Inaugural Address (Mar. 4, 1861), *reprinted in* INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES, S. Doc. No. 101-10, p. 139 (1989).

This Court has sustained laws protecting the psychological and physical well-being of children "even when the laws have operated in the sensitive area of constitutionally protected rights." *Id. See, e.g., Osborne v. Ohio*, 495 U.S. 103 (1990) (Ohio statute proscribing the mere possession and viewing of child pornography); *Ginsberg v. New York*, 390 U.S. 629 (1968) (New York law protecting children from exposure to nonobscene pornography); *FCC v. Pacifica*, 438 U.S. 726 (1978) (regulation of indecent but nonobscene radio broadcasts to protect children).

Moreover, Congress has proceeded upon the presumption that the materials affected by its legislative judgment — indecent but not obscene materials — are entitled to some form of constitutional protection. So Congress did not attempt to suppress entirely this category of communication. Instead, COPA imposes a framework for enforcement of restrictions on access to commercial sites vending indecent materials. Congress' eminently reasonable judgment is consistent with the First Amendment and with this Court's decisions.

II. CONGRESS' USE OF THE COMMUNITY STANDARD FOR DETERMINATION OF PRURIENCY AND/OR PANDERING IS CONSISTENT WITH THIS COURT'S DECISIONS

In the world of legerdemain, one of the most familiar tricks is known as the Cups and the Balls. In the game of the Cups and the Balls, the magician offers the tempting opportunity to a mark in the crowd to select the cup under which a ball has been hidden. The magician seldom loses: his skill is measured in terms of sophisticated *mis*direction. To make the event

sporting, there are three cups and they are shifted about thoroughly on a table top, while the magician casts a spell of entertaining oratory over the mark. Only the most careful, the most crafty, are able to select the correct cup on the first try.

The familiar parlor trick of the Cups and the Balls serves well to illustrate the dilemma presented to Congress as it pursues its constitutional prerogative of setting national policy by legislation. The Congress has devoted particular attention to the task, just like the mark does when he is invited to play along at the adept's table. The Congress has carefully considered the holdings of this Court, in cases considering challenges to statutes analogous to COPA, just like the mark carefully listens to the mellifluous intonations of the magician. And, just like the mark who feels played for a fool when the cup he selects holds nothing, so Congress is made to seem to play the fool, at least in the light of the Third Circuit's decision.

But COPA is not deserving of the treatment given it below. The scope of COPA is limited to materials that:

> (A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;
>
> (B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and

> (C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

47 U.S.C. 231(e)(6) (Supp. IV 1998). Assertions by the Respondents notwithstanding, COPA applies only to material that is "clearly pornographic," and not to "entertainment, library, or news materials that merely contain nudity or sexual information." H.R. Rep. No. 775, 105th Cong., 2d Sess. 28 (1998). Nonetheless, the Third Circuit, affirming the grant of a preliminary injunction, concluded that COPA "impose[d] an overreaching burden and restriction on constitutionally protected speech," *ACLU v. Reno*, 217 F.3d 162, 176 (3rd Cir. 2000). That conclusion flowed from the court's reasoning that "COPA[unconstitutionally relies] on 'contemporary community standards' in the context of the electronic medium of the Web to identify material that is harmful to minors." 217 F.3d at 173. The Court reasoned that:

> Because material posted on the Web is accessible by all Internet users worldwide, and because current technology does not permit a Web publisher to restrict access to its site based on the geographic locale of each particular Internet user, COPA essentially requires that every Web publisher subject to the statute abide by the most restrictive and conservative state's community standards in order to avoid criminal liability.

217 F.3d at 166.

The Third Circuit was wrong. Its holding, regarding the constitutionality of COPA's community standards provision, conflicts with this Court's decisions in directly relevant

circumstances.

First, the decision below cannot be squared with *Miller v. California*, 413 U.S. 15, 24, 30 (1973). In *Miller*, this Court upheld the constitutionality of applying community standards to determine whether material appeals to the prurient interest and is patently offensive. Since the decision in *Miller*, it has been an accepted feature of the landscape of pornography regulation that pruriency and patent offensiveness may be determined according to localized standards.

Second, the decision below cannot be squared with either *Hamling v. United States*, 418 U.S. 87 (1974) or *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989). In both cases, this Court found no constitutional barrier to requiring commercial entities whose commercial activities have effects in multiple geographic areas to bear the responsibility for complying with the standards in each geographic area. COPA's incorporation of a community standard does not violate the First Amendment.

The facts of *Hamling* and *Sable* are not distinguishable in any significant way from those presented by the activity regulated under COPA. Neither case presented instances of expressive activity that was, in fact, limited in its commercial distribution to a single, isolated location. This Court's holdings in those cases cannot support any conclusion to the contrary. Rather, those decisions leave intact the fair and reasonable requirement that those commercial entities enjoying the benefit of a nationwide market should ensure that those communications are not harmful to children throughout the nation. Commercial decisions need not be rewarded, just as they

are not necessarily being "punished" by a decision to subject their transmission to reasonable standards. When a commercial entity chooses to speak to an "audience . . . comprised of different communities with different local standards," it must "ultimately bear[] the burden of complying with the prohibition on [harmful-to-minor] messages." *Sable*, 492 U.S. at 126.

In their Brief in Opposition, as 22-23, Respondents charged that technological deficiencies of the World Wide Web were such that, in order for commercial entities to comply with the requirements of COPA, they would be required to comply with the standards of the most conservative community from which minors could access the World Wide Web. That argument suffers from two problems, at least. First, as a matter of fact, Congress concluded that the harmful to minors standard is "one that is reasonably constant among adults in America." H.R. Rep. No. 775, 105th Cong., 2d Sess. 28 (1998). And Respondents muster no proof to the contrary. Consequently, Congress has concluded that what is considered "harmful to minors" in one geographically isolated locale in the United States is not likely to be different in kind or substance from that which is thought to be "harmful to minors" in other regions.

Second, the argument of technological deficiency is utterly lacking in meritorious weight. An illustration of its application shows that it warrants no consideration. Take the instance of ordinances regulating the volume of noise projected by sound trucks. It could not be reasonably thought a defect in such *ordinances* that the manufacturers of amplifiers used in sound trucks only constructed amplifiers with one setting: maximum. Yet this is the very argument offered by the Respondents; there is more of a tantrum in such an argument than there is of

comprehension of the compelling interests at stake in Congress' effort to set national policy regarding commercial dissemination of indecent materials to minors.

Thus, the court of appeals erred in its community standards holding.

III. THE ALTERNATE GROUNDS OF AFFIRMANCE PRESSED BY THE RESPONDENTS ARE WITHOUT MERIT

The ACLU glibly recasts COPA as nothing more than *CDA II*,[3] Opp. Br. at 9-13, but one must approach the magician's table with care. In fact, it is nearly certain that, as when the magician speaks, *mis*direction is in the works with the ACLU's assertion. This fact can be adduced from the substantial differences between COPA and the Communications Decency Act of 1996 and from the failure of the ACLU to see or acknowledge those differences. The differences between the two statutes demonstrate the attention paid by Congress to this Court's decision in *Reno v. ACLU*, 521 U.S. 844 (1997). Because of the care taken by Congress, COPA is, in fact, the least restrictive means to accomplish the compelling interest in protecting minors from the harm associated with exposure to indecent materials on the World Wide Web.

The following key points of distinction exist between CDA and COPA:

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3. *See, e.g.*, ACLU Press Release titled "House Committee Approves CDA II" (Sept. 24, 1998) (located at http://www.aclu.org/news/n092498b.html).

CONTRASTS BETWEEN CDA AND COPA	
CDA	**COPA**
Breadth of Reach	
applied to all Internet communication, including e-mail, listservs, newsgroups, chat rooms, and the World Wide Web[4]	applies only to materials on the World Wide Web[5]
Scope of Materials Covered	
applied to any material that was "indecent" or "patently offensive," without defining those terms[6]	applies only to material that satisfies the specific three-prong standard
Minors Affected	
minor is any person under the age of 18[7]	minor is "any person under 17 years of age"[8]

4. *Reno v. ACLU*, 521 U.S. at 851.

5. 47 U.S.C. 231(a)(1) (Supp. IV 1998); H.R. Rep. No. 775, supra, at 12, 25.

6. *Reno v. ACLU*, 521 U.S. at 871 & n.37, 873, 877.

7. *Reno v. ACLU*, 521 U.S. at 865-866.

8. 47 U.S.C. 231(e)(7) (Supp. IV 1998); *cf. Ginsberg v. New York*, 390 U.S. 629 (1968) (affirming statute of similar scope).

CONTRASTS BETWEEN CDA AND COPA	
CDA	**COPA**
Actors Affected	
applied to commercial entities or transactions, to all nonprofit entities, and to individuals posting messages on their own computers[9]	applies only to those Web communications that are made "for commercial purposes"[10]
Impact on Family Governance	
barred parents from permitting their children from using a family computer to view regulated material[11]	contains no such prohibition[12]

Each of the foregoing five factors was considered by this Court in *Reno v. ACLU*. In fact, this Court offered these factors as illustrations of its judgment that the CDA could not be justified under *Ginsberg* and of why it failed strict scrutiny. *See Reno*, 521 U.S. at 865-866, 870-874, 877-879. Thereafter, in light of this Court's decision, Congress again took up the problem of proliferating indecency on the Internet. With

9. *Reno v. ACLU*, 521 U.S. at 856, 865, 877.

10. 47 U.S.C. 231(a)(1) (Supp. IV 1998).

11. *Reno v. ACLU*, 521 U.S. at 865, 878.

12. H.R. Rep. No. 775, *supra*, at 15.

COPA, Congress tailored its legislative response in a manner that responds to those very concerns that this Court identified. Thus, Respondents misplace their reliance on *Reno v. ACLU* and are incorrect in their assertion that *Reno* requires invalidation of COPA.

The differences between CDA and COPA are real and meaningful. Unlike some other means of communication on the Internet, screening for age on the World Wide is feasible both technologically and economically. Pet. App. 75a-77a. COPA's three-prong harmful-to-minors standard mirrors the statutory standard considered and approved by this Court in *Ginsberg*. The standard adopted by COPA is free of the vagueness that plagued the CDA. And Congress gave COPA a decidedly narrower focus; consequently such things as the seven "dirty words" monologue, *see FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), and library card catalogues, are not at risk. *See Reno v. ACLU*, 521 U.S. at 878. Moreover, Congress' decision to lower the age restrictions of COPA to less than 17 gives more mature minors access to the affected materials. Those that post material "for commercial purposes" should reasonably be expected to bear the cost of compliance; such is simply one facet of the cost of doing business. Finally, Congress' decision to lift the bar on parents permitting their own children to view affected materials averts interference with the parent-child relationship. To say, as Respondents' have, *see* Brief in Opposition at 12-13, that differences between the CDA and COPA have "no constitutional significance" is simply incorrect.

Alternatively, Respondents contend that COPA unconstitutionally burdens constitutionally protected speech because it deters adults from seeking access to material

screened by adult verification services. Perhaps "some" adults will be deterred as they seek out regulated materials because they have been placed behind adult verification services, *see* Pet. App. at 81a. That effect is a small price to pay to protect children from materials deemed harmful to minors, including graphic pornographic images on the World Wide Web.

If Respondents are correct, and if the slight inconvenience of using an adult verification service to access indecent online materials rises to the level of an unconstitutional burden, then state laws obliging commercial vendors to place "harmful to minors" material behind a "blinder rack," in a "sealed wrapper," or inside an "opaque cover," and that require proof of adult status for purchase of such materials, are all also unconstitutional. Each of those laws deters "some" adults from buying the regulated materials. Nonetheless, lower courts consistently affirm the constitutionality of such laws. *See, e.g., Crawford v. Lungren*, 96 F.3d 380 (9th Cir. 1996), *cert. denied*, 520 U.S. 1117 (1997); *American Booksellers v. Webb*, 919 F.2d 1493, 1509 (11th Cir. 1990), *cert. denied*, 500 U.S. 942 (1991); *American Booksellers Ass'n v. Virginia*, 882 F.2d 125, 127-128 (4th Cir. 1989), *cert. denied*, 494 U.S. 1056 (1990); *Upper Midwest Booksellers Ass'n v. City of Minneapolis*, 780 F.2d 1389 (8th Cir. 1985); *M.S. News Co. v. Casado*, 721 F.2d 1281 (10th Cir. 1983). No other result is warranted in this case.

Finally, in a moment of some irony, respondents press the case that COPA is not narrowly tailored because filtering software used by parents is less restrictive and at least as

effective.[13] COPA requires Web publishers to take steps to prevent minors from obtaining access to material that is harmful to them. Under the less restrictive alternative view pressed by the Respondent, there would be no entity that Congress could compel to use filtering software. *See* Pet. App. 94a n.6; *compare United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 816 (2000). Moreover, as the ACLU has elsewhere claimed, *see* n.12, *supra*, blocking software is of limited efficacy, because filters can block inoffensive materials while failing to screen other, offensive materials. *See* Pet. App. 94a. Moreover, computer-savvy minors can easily defeat such filtering programs. *Id.* at 82a.[14] And filtering software is not

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13. The irony stems from the fact that in another case, now pending in the Eastern District of Pennsylvania, ACLU attorneys have challenged the efficacy and constitutionality of filtering requirements. There, representing libraries, library consortia, library patrons and web content providers, the ACLU has asserted that a federal law compelling grant recipient libraries to use filtering technology on computers available for the use of minors. *See Multnomah County Public Library, et al. v. United States*, Civil Action No. 2:01cv01322, Complaint ¶¶ 83-121 (E. D. Pa. complaint filed Mar. 20, 2001) (setting forth factual assertions for claim that filtering technology is ineffective and unreliable). So COPA is unconstitutional, the ACLU claims, because filtering is a less restrictive alternative. But, out of the other side of its mouth, the ACLU is telling a three-judge district court in Pennsylvania that filtering is ineffective, inefficient, and, where mandated by federal law, unconstitutional.

14. And computer-savvy minors who want to crack filtering programs find plenty of assistance on the World Wide Web. One site, for example, "Peacefire" offers cracking advice on every major filtering program currently marketed in the United States. *See* Peacefire Homepage (http://www.peacefire.com) (offering links to cracking instructions for CYBERsitter, Cyber Patrol, Net Nanny, BESS, SurfWatch, SmartFilter, X-Stop, NetRated, I-Gear, and SafeSurf). The motto of Peacefire, it seems, *see id.*, is "*It's not a crime to be smarter than your parents.*"

cheap to buy, H. R. Rep. No. 775, *supra*, at 19, or cheap to maintain. *Id.* at 20 (filtering software requires periodic updates at added costs).

It is an error in the Respondents' logic to set the requirements of COPA up against filtering software; they are not mutually exclusive. Congress was aware that the two approaches could operate in a synthesis, and intended that they do so to protect minors from exposure to harmful materials. *See* 47 U.S.C. 230(d) (Supp. IV 1998) (requiring Internet service providers to notify customers of the availability of blocking software); H.R. Rep. No. 775, *supra*, at 19 (noting that blocking software may be effective for many parents). Disputes over comparative effectiveness of these alternatives are beside the point. More pertinent is the question whether Congress's plan -- the consequence of which is that the structures provided by COPA operate jointly with parental or other blocking software -- is significantly more effective in blocking minors' access to harmful materials than blocking software alone. Because, taken together, the two approaches are much more effective in screening harmful materials, the alternative proposed by the Respondents is not as effective as the scheme that Congress enacted.

CONCLUSION

For all the foregoing reasons, the judgment below should be

reversed.

Respectfully submitted,

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